United Nations A/HRC/WGAD/2017/87

General Assembly

Distr.: General
23 January 2018
English
Original: Spanish

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 87/2017 concerning Marcelo Eduardo Crovato Sarabia (Bolivarian Republic of Venezuela)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 10 July 2017, the Working Group transmitted to the Government of the Bolivarian Republic of Venezuela a communication concerning the detention of Marcelo Eduardo Crovato Sarabia. The Working Group requested the Government to submit a response with its observations on the case by 8 September 2017. On 7 September 2017, the Government requested an extension to respond to the communication, which was granted. The Government sent information relating to the case on 9 October 2017, and this was transmitted to the source for additional comments, which in turn were received on 1 November 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Marcelo Eduardo Crovato Sarabia, born in 1966 and a Venezuelan and Argentine national, is a criminal defence lawyer residing in the municipality of Chacao in Miranda State. Mr. Crovato Sarabia works with a non-governmental organization (NGO) whose activities include providing free assistance to individuals who report human rights violations.

5. The source reports that on 22 April 2014 Mr. Crovato Sarabia arrived at his client's home, located in the municipality of Chacao in Miranda State, to provide him with legal assistance during a house search conducted by officers of the Scientific, Criminal and Forensic Investigation Unit. However, while assisting his client, Mr. Crovato Sarabia was arrested by the Unit's National Department of Criminal Investigations. The officers did not present a warrant or any other decision issued by a public authority.

6. According to the source, on 22 April 2014, Mr. Crovato Sarabia was taken to the headquarters of the Scientific, Criminal and Forensic Investigation Unit in Caracas. He was later transferred to the premises of the Unit's Special Operations Brigade, located in San Agustín del Sur in the municipality of Libertador in the Capital District of Caracas.

7. The source explains that provisional prosecutor No. 59 of the Public Prosecution Service of the Caracas Metropolitan Area then issued a telephone order for Mr. Crovato Sarabia to be detained. During the suspect's hearing, held from 24 April 2014 to 26 April 2014 before the first instance supervisory court No. 9 of the Caracas Metropolitan Area Criminal Court Circuit, the judge accepted the initial classification of the offences presented by the prosecutor of the Public Prosecution Service on the grounds that Mr. Crovato Sarabia was allegedly involved in the commission of the following offences: (a) obstructing the public highway, an offence provided for and punishable under article 357 of the Criminal Code; (b) incitement to disobey the law, an offence provided for and punishable under article 285 of the Criminal Code; (c) public intimidation, an offence provided for and punishable under article 296 of the Criminal Code; and (d) criminal association, an offence provided for and punishable under article 37 of the Organized Crime and Financing of Terrorism Act. The source points out that the court declared the detention invalid under article 175 of the Code of Criminal Procedure as it constituted a violation of fundamental rights. However, it decided to uphold pretrial detention on the aforementioned charges.

8. On 30 April 2014, court No. 9 ordered a change in the place of detention at the request of the Public Prosecution Service, and sent Mr. Crovato to the Rodeo II detention centre in Guatire in the State of Miranda. From there, Mr. Crovato Sarabia was transferred to the Yare III detention centre in San Francisco de Yare, Miranda State, as an accused person awaiting a preliminary hearing. On 26 February 2015, a protective measure of house arrest was ordered. Mr. Crovato Sarabia was transferred to his current place of detention, at his usual address, and is under the custody of the Bolivarian National Police.

9. The source adds that the preliminary hearing is intended to determine whether there is sufficient evidence to send the case to trial, and that under Venezuelan law and international standards, the hearing should take place promptly and transparently. However, this hearing has been postponed 32 times. In the absence of a preliminary hearing, the court has kept the custodial measure in place indefinitely. At the time of the submission of this communication, it had been in place for two years and two months — which constitutes a de facto sentence without a conviction.

10. The source notes several steps taken before the courts to verify the lawfulness of the detention. On 7 May 2014, an appeal was lodged with first instance supervisory court No. 9

of the Caracas Metropolitan Area Criminal Court Circuit. Chamber No. 4 of the Appeals Court of the criminal court circuit of the Caracas Metropolitan Area issued a ruling on 17 June 2014 upholding the contested decision and consequently the measure of pretrial detention imposed by court No. 9.

11. On 4 December 2015, Mr. Crovato Sarabia's defence requested the review and substitution of the measure of house arrest. The court did not grant the request, however, and upheld the measure of house arrest. The defence also filed an application for constitutional *amparo* for denial of justice in December 2015. On 19 December 2016, a year after it had been submitted, the application for *amparo* was denied.

12. On 27 April 2016, Mr. Crovato Sarabia's defence filed an application for the measure of house arrest to be curtailed given that he had been in detention for two years without a preliminary hearing, citing article 230 of the Code of Criminal Procedure (proportionality), coupled with the fact that the Public Prosecution Service had not requested an extension of the custodial measure. The source reports that, although court No. 9 had agreed to try Mr. Crovato Sarabia's case separately, given that due to his health condition he could not attend the continuation of his preliminary hearing (Mr. Crovato Sarabia had two back operations during his period of detention), on 11 January 2017, the court annulled the separation decision. On 30 January 2017, the same court refused the request for curtailment of the measure of house arrest. Finally, on 14 February 2017, an action was filed for revocation of the decision denying the request for curtailment. No response has been received to date.

13. The source maintains that Mr. Crovato Sarabia's detention is arbitrary under categories I, II, III and V of the methods of work. In relation to category I, the source notes that the arrest took place in the absence of a warrant or a case of *flagrante delicto*; all the appeals filed by the defence have been rejected; the preliminary hearing has been postponed 32 times; and the petitioner has been held in detention without a conviction or a trial for two years and two months, which means it is clearly impossible to invoke any legal basis justifying his detention.

14. In relation to category II, the source notes that at the time of his arrest, Mr. Crovato Sarabia was safeguarding his client's right to access to justice, liberty and security, the presumption of innocence, privacy of the home, and freedom of thought, opinion and expression. At the same time, Mr. Crovato Sarabia was exercising his right to freedom of association and to be heard in court. However, Mr. Crovato Sarabia was arrested without a warrant or being caught *in flagrante delicto* for having exercised his rights and represented his client. The source concludes that this constitutes a violation of the rights enshrined in international standards (articles 8, 10 and 20 of the Universal Declaration of Human Rights and 2, 9, 14, 17, 19 and 22 of the Covenant) and that the detention is therefore arbitrary under category II of the methods of work.

15. In relation to category III, the source notes that Mr. Crovato Sarabia's detention is based on judicial proceedings that are patently political, as shown by the actions of the Government and the line taken in the media by the ruling party, all of which are open violations of numerous international rules relating to a fair trial. In particular, due to the 32 adjournments that have delayed the trial unreasonably, he has already, without having been convicted, served a de facto sentence of two years and two months in detention. The failure to respect the right to be tried without undue delay is of such gravity as to give the deprivation of liberty of the petitioner an arbitrary character. Consequently, the source concludes that the detention is arbitrary under category III of the methods of work.

16. With regard to category V, the source points to a pattern of violations of international law against human rights defenders in the Bolivarian Republic of Venezuela, in particular the systematic use of arbitrary detention against persons who are considered politically inconvenient so as to prevent them from expressing ideas and political opinions that run counter to government policies. The source alleges that there is evidence of the Government discriminating against persons who protest against the government. Moreover, according to the source, the Government punishes the expression of political ideas that are not in line with those of the regime, as well as peaceful and legitimate protests, going so far as to restrict those rights by the kind of measure usually associated with the repression of

acts of violence, propaganda for war, and incitement to national, racial or religious hatred, all of which are prohibited by law.

17. Mr. Crovato Sarabia was arrested while acting as defence counsel for his client, who is now a political prisoner. Furthermore, the source argues that Mr. Crovato Sarabia's arbitrary detention was carried out with the aim of persecuting an identifiable group or collectivity (human rights defenders) on political grounds, and to intimidate him and other human rights defenders, in violation of international law. The source highlights the political nature of the detention and notes that the Government, in collusion with the justice authorities, seeks to persecute political dissidents and their defenders, thereby committing violations of international law by reason of discrimination based on political opinion, ignoring the principle of equality of human rights. The source concludes that Mr. Crovato Sarabia's detention is arbitrary under category V of the methods of work.

Response from the Government

18. The Government indicates that Mr. Crovato Sarabia was arrested in the municipality of Chacao in the State of Miranda on 22 April 2014. According to the police report: "on 22 April 2014, following the arrest of [...] on basis of evidence of a potential crime seized during the house search, Marcelo Eduardo Crovato arrived at the residence claiming to be [...]'s lawyer and the officer supervising the search states that at that moment it was realized that, according to a report of 10 April 2014, this person had attended a meeting in the same building, where several pieces of evidence of a potential crime were found that had a rational link to the investigation; the main purpose of that meeting being to plan acts aimed at destabilizing the Government, with the participation of "Eli" — on that occasion going by the name of "Marco" — and [...], who were supposedly lawyers; on the basis of which he made a telephone call to the prosecutor of the Public Prosecution Service, who ordered that Crovato appear in court together with the other suspects".

19. According to the Government, Mr. Crovato Sarabia appeared before the first instance supervisory court No. 9 of the Caracas Metropolitan Area Criminal Court Circuit on 24 April 2014. The initial hearing began on 24 April and ended on 26 April 2014, when court No. 9 ordered a measure of pretrial detention, in accordance with the provisions of the Code of Criminal Procedure, for the alleged commission of the offences of obstructing the public highway, incitement to disobey the law, public intimidation and criminal association.

20. In its decision, court No. 9 analysed the circumstances of Mr. Crovato Sarabia's detention, noting the following: "firstly, with regard to the detention of the suspects, the person ruling should take into account that, in the present case, the individuals appearing at this hearing have not been detained under an arrest warrant or *in flagrante delicto*, as provided for in article 44.1 of our Constitution, and therefore, the appropriate action under the laws in force is to declare null and void the arrest of the citizens Marcelo Crovato [...], in compliance with article 175 of the Code of Criminal Procedure". However, the same ruling states that "this court expressly notes that it refers to judgment No. 526 issued by the Constitutional Chamber of the Supreme Court of Justice in 2001, presented by Judge Iván Rincón Urdaneta, in which it is noted that alleged violations committed by police officers when arresting an individual cannot be brought before the courts, as the arrest is legitimized when the individuals appear and are heard in compliance with legal safeguards, which is what has happened in the present hearing; the situation must therefore be deemed *in flagrante* and the evidence available in the case file reviewed".

21. The Government reports that Mr. Crovato Sarabia's defence lodged an appeal against the decision of court No. 9 on 7 May 2014. The Appeals Court ruled on the appeal on 17 June 2014. In deciding on the appeal, the Appeals Court examined the validity of the order issued by court No. 9 to conduct a house search, on the basis of which Mr. Crovato Sarabia was arrested, noting that the execution of this order was valid given that it was carried out within seven days of being issued.

22. Similarly, the Government notes that the Appeals Court examined the validity of Mr. Crovato Sarabia's arrest and indicated that "even in cases where *flagrante delicto* has not been proven, this does not mean that the court cannot order the application of an individual coercive measure … therefore, although Marcelo Eduardo Crovato Sarabia was not arrested

in flagrante delicto (as was noted by the lower court judge) since the requirements of article 234 of the Code of Criminal Procedure were not met, nonetheless, the alleged violation of constitutional rights ceases once that order has been issued".

23. Furthermore, the Appeals Court also dismissed the claim that Mr. Crovato Sarabia had been deprived of liberty for performing his duties as a lawyer, arguing that "the arrest of the suspect Marcelo Eduardo Crovato Sarabia is unrelated to the free exercise of his profession ... it was a coincidence that at the time of his arrest he was preparing to provide assistance at a house search that had already ended, and that at that very moment he was identified by one of the police officers as one of the persons who, according to a report by an undercover agent dated 10 April 2014, had attended a meeting in the same building ..., the main point of which was to plan terrorist acts to destabilize the central Government ...; this was the reason for his arrest, and it had nothing to do with the professional duties he claimed to be performing at the time".

24. The Government notes that the Appeals Court dismissed the request for revocation of the custodial measure imposed on Mr. Crovato Sarabia, arguing that he was suspected of involvement in the offences of which he was accused, namely, obstruction of the public highway, incitement to disobey the law, public intimidation and criminal association. The Appeals Court also believed that, given the gravity of the acts and the maximum penalties possible, the accused was a flight risk. In addition, the Court stated that it was reasonable to assume a risk that efforts to establish the truth might be obstructed since the suspects could induce witnesses with knowledge of the facts to give false testimony or behave in an unethical or deceptive manner. In the light of the foregoing, it dismissed the application for revocation of the pretrial detention.

25. The Government cites various provisions of the Constitution (art. 44), the Criminal Code (arts. 285, 296 and 357), the Organized Crime and Financing of Terrorism Act (art. 37) and the Code of Criminal Procedure (arts. 234 and 236–238).

26. As noted above, the Government indicates that this shows that the detention of Mr. Crovato Sarabia is in full compliance with the due process guarantees relating to personal freedom that are set forth in the Covenant, which recognize that there may be legal restrictions on the right to personal freedom, such as those applied in the present case.

27. Lastly, the Government reports that, since 26 February 2015, Mr. Crovato Sarabia has been under house arrest by order of the court.

Further comments from the source

28. The source submitted comments and observations on the State's reply on 1 November 2017. The source explains that it is not true that Mr. Crovato Sarabia was arrested in the municipality of Chacao in Miranda State, where his permanent residence is located. On the contrary, he was brought under false pretences to the headquarters of the Scientific, Criminal and Forensic Investigation Unit, located at Avenida Urdaneta, at the corner of Pelota and Punceres, in Catedral parish in the centre of Caracas, on the pretext that his client had to go there to sign the search report.

29. The source indicates that the arrest did indeed take place on 22 April 2014, when Mr. Crovato Sarabia's client called him, as his lawyer, at approximately 4 a.m., to inform him that officers of the Scientific, Criminal and Forensic Investigation Unit were at his door to conduct a search of his home, and he therefore needed his assistance and legal advice *in situ*. Mr. Crovato Sarabia promptly and diligently went to the residence where the search was being conducted; he was prevented from carrying out his work as a lawyer by the inspector in charge of the group of officers conducting the search, who stopped Mr. Crovato Sarabia from entering the residence in which the police operation was being conducted that resulted in the arrest of his client and other persons present at the time. The source therefore contends that Mr. Crovato Sarabia was prevented from doing his work as a lawyer and later, in the same case, went from being a lawyer to being a detainee on arbitrary grounds.

30. The source notes that Mr. Crovato Sarabia was arrested because he was identified as one of the individuals mentioned in a prior police report, which had given rise to the aforementioned house search. The police report mentioned an individual identified as

"Marco". However, according to the Government response, a police officer on duty identified him as the same person as "Marco". The source points out that, to date, the Public Prosecution Service has not provided any other information or statement other than that of the unidentified police officer, to corroborate that "Marco" is in fact Mr. Crovato Sarabia.

31. The source indicates that the accused's preliminary hearing began on 24 April and ended, on 26 April 2014, with a pretrial detention order. However, the source points out that at that time there was no reasonable or reliable presumption that the offences invoked had actually been committed. The Government argues in its accusation that a meeting took place at which it is alleged that the participants planned "obstruction of the public highway", "incitement to disobey the law", "public intimidation" and "criminal association". However, the mere fact that an alleged meeting was held hardly shows a causal link with the above-mentioned offences. In addition, the public prosecutors involved in the hearing decided to charge Mr. Crovato Sarabia and request the heaviest of all custodial measures, purely on the basis of the claim by a police officer that a certain "Marco" was in fact Mr. Crovato Sarabia, contrary to the principle of the right to be tried while at liberty that should prevail in the Venezuelan criminal process.

32. The source states that Mr. Crovato Sarabia's arrest was declared null and void by the Caracas first instance supervisory court No. 9 because there was no arrest warrant against him and he was not caught *in flagrante delicto*; therefore, the court recognized that the detention was arbitrary and unconstitutional. That is, the courts themselves admitted that the police officers who carried out the arrest acted arbitrarily. Nonetheless, just moments after the hearing, the court ignored its own decision and invoked a judgment of the Supreme Court (No. 526 of 2001), asserting that the violations committed by the arresting officers could not be brought before the court. The source states that the court found that the detention was arbitrary and unconstitutional, but did not punish the officers responsible for unlawfully depriving Mr. Crovato Sarabia of his liberty, instead legitimizing the offending action by ordering pretrial detention rather than restoring the violated right and granting him full freedom, as would have been right and proper in law.

33. The source indicates that, if the Public Prosecution Service intended to subsequently investigate Mr. Crovato Sarabia, it should have informed him of the charges against him, guaranteed him timely access to the case file and ultimately allowed him to exercise his right to a defence, which did not happen in the present case. Rather than pursuing the criminal investigation, he has been kept in continued detention from 22 April 2014 to date (more than three and a half years) by means of unjustified postponements of the preliminary hearings. To date there have been no fewer than 48 unjustified cancellations, which have allowed the de facto detention to continue without any legal basis.

34. The source notes that the Government's response does not clarify why Mr. Crovato Sarabia was arrested when providing legal assistance to his client. It does, however make clear that the arrest was related to "undercover operations" and "field operations to infiltrate gatherings and meetings". In other words, it accepts the response from the Public Prosecution Service to the effect that the investigation was related to "gatherings and meetings" designed to "destabilize the central Government". In the source's view, it is clear that a comparison is being made between the exercise of civil and political rights in the infiltrated demonstrations, gatherings and meetings and the alleged criminal acts claimed by the Government. This comparison points to the Government's real political motivation for the investigation, by contrast with the arguments in criminal law it put forward in its reply.

35. In the source's view, Mr. Crovato Sarabia was arrested without a warrant and without being *in flagrante delicto*. The original arrest was arbitrary, as acknowledged by the court in declaring the arrest null and void. Therefore, keeping Mr. Crovato Sarabia in detention is also arbitrary for many reasons, including, as the source highlights, the fact that there was no legal justification for not observing the principle of trial while at liberty, which should prevail in the Venezuelan criminal process. Furthermore, in the source's view, the detention is arbitrary because there is no legal justification for maintaining a custodial measure by cancelling the relevant preliminary hearing (during which a decision must be taken on the accused's release and the acceptance of the indictment) more than 48 times over a period of more than three years and six months, when the maximum period allowed

under Venezuelan law is two years.[1] In addition, the source reiterates that the detention is arbitrary because the government authorities clearly have political reasons for keeping Mr. Crovato Sarabia in detention, as part of a systematic pattern of using arbitrary detention to instil fear among political opponents, thus preventing them from expressing ideas and opinions that are contrary to government policies.

36. The source concludes by noting that the criminal case against Mr. Crovato Sarabia is at the preliminary hearing phase, which means that it is not known whether the indictment will be accepted or not and whether he will be put on public trial; as counsel requested of the court, the case might be stayed, whereupon the liberty of which he should never have been deprived would be immediately restored.

Discussion

37. The Working Group is mandated to investigate all cases of deprivation of liberty imposed arbitrarily that are brought to its attention. In the discharge of its mandate, it refers to the relevant international standards set forth in the Universal Declaration of Human Rights, the Covenant and the relevant international legal instruments, in accordance with its methods of work.

38. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.[2]

39. The Working Group notes that Mr. Crovato Sarabia was arrested on 22 April 2014 by officers of the Scientific, Criminal and Forensic Investigation Unit while providing legal assistance to a client. The Working Group further notes that the authorities did not inform him of the reasons for his arrest and did not present an arrest warrant or other official documentation issued by a public authority, and nor was he shown to have been *in flagrante delicto*. In addition, the Working Group is persuaded that the suspect was brought before the court on 24 April 2014, i.e. two days after the arrest, but that the preliminary hearing has still not been held after more than two years, having been postponed on at least 48 occasions, and that proceedings have not been initiated against Mr. Crovato Sarabia.

40. Consequently, the Working Group is of the view that Mr. Crovato Sarabia's detention is arbitrary for lack of any legal basis, in accordance with category I of the methods of work.

41. The Working Group is persuaded that, according to the submissions of both sides, Mr. Crovato Sarabia works with a Venezuelan civil society organization whose activities include providing free legal assistance to individuals alleging human rights violations. Given the absence of convincing information on the alleged crimes committed by Mr. Crovato Sarabia, and his well-known participation in a human rights organization, the Working Group considers that his detention is related to his work as a human rights defender. Consequently, the Working Group considers that Mr. Crovato Sarabia's detention is arbitrary under category II of its methods of work, as it violates articles 19 to 21 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant.

42. As previously mentioned, the Working Group is persuaded that the authorities did not present an arrest warrant or other official documentation issued by a public authority, and failed to show *flagrante delicto*. It is also noted that Mr. Crovato Sarabia has not been informed of the charges against him, as the preliminary hearing for this purpose has been postponed 48 times. Following the hearing held from 24 to 26 April 2014, the measure of pretrial detention was imposed. However, in the absence of a preliminary hearing to

[1] See article 230 of the Code of Criminal Procedure, which provides that a custodial measure may not be ordered if it appears disproportionate to the seriousness of the offence and the circumstances of its commission and the likely penalty. Under no circumstances may it exceed the minimum penalty provided for each offence or a period of two years.

[2] See A/HRC/19/57, para. 68.

determine whether or not to go to trial, the court has maintained the measure of house arrest since 26 February 2015.

43. In 1993, when it issued its deliberation No. 1 on house arrest, the Working Group noted that it may, in any given case, determine whether house arrest constitutes arbitrary detention.[3] Since that time, house arrest has been equated to deprivation of liberty, to the extent that the person is in closed facilities and is not allowed to leave. Currently, the Working Group considers house arrest to be a form of deprivation of liberty to which consent has not been given.[4]

44. The Committee recalls that article 9 (2) of the Covenant establishes that anyone arrested shall be informed at the time of arrest of the reasons of arrest and of any charges against him or her. Paragraph 3 of the article also stipulates that anyone arrested or detained on a criminal charge has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power and is entitled to trial within a reasonable time or to release.

45. In the present case, these provisions have been violated to the detriment of Mr. Crovato Sarabia, rendering the detention arbitrary under category III of the methods of work, as the authorities of the Bolivarian Republic of Venezuela have seriously violated international standards relating to a fair trial, as set forth in the Universal Declaration of Human Rights and the Covenant.

46. On the basis of the information available to it, the Working Group considers that Mr. Crovato Sarabia's detention by the Government is also arbitrary under category V, inasmuch as it is based on political opinion as expressed by his membership of a civil society organization that is critical of the Government, in violation of international law, which prohibits discrimination on such grounds, and therefore in violation of the principle of the equality of human beings.

47. In addition, the Working Group wishes to recall that under certain circumstances systematic imprisonment and other serious forms of deprivation of physical liberty in violation of internationally recognized standards may constitute crimes against humanity.[5]

48. In recent years, the Working Group has repeatedly expressed its views on multiple arbitrary arrests of persons because of their political opposition to the Government, or because they have exercised their rights to freedom of opinion, of expression, of association, of assembly or of political participation.[6] In the Working Group's view, it is a systematic attack or practice by the Government intended to deprive political opponents of their physical freedom, particularly those who are considered opponents of the regime, in

[3] E/CN.4/1993/24.

[4] United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37).

[5] See opinions Nos. 37/2011, para. 15, 38/2011, para. 16, and 39/2011, para. 17 (Syrian Arab Republic); Nos. 4/2012, para. 26, 47/2012, paras. 19 and 22, 34/2013, paras. 31, 33 and 35, 35/2013, paras. 33, 35 and 37, and 36/2013, paras. 32, 34 and 36 (Democratic People's Republic of Korea); Nos. 38/2012, para. 33, and 48/2013, para. 14 (Sri Lanka); Nos. 22/2014, para. 25, 27/2014, para. 32, and 34/2014, para. 34 (Bahrain); No. 35/2014, para. 19 (Egypt); No. 44/2016, para. 37 (Thailand); and Nos. 32/2017, para. 40, 33/2017, para. 102, and 36/2017, para. 110 (Iraq).

[6] Opinions Nos. 52/2017 (Gilbert Alexander Caro Alfonzo), 37/2017 (Braulio Jatar); 18/2017 (Yon Alexander Goicoechea Lara); 27/2015 (Antonio José Ledezma Diaz); 26/2015 (Gerardo Ernesto Carrero Delgado, Gerardo Rafael Resplandor Veracierta, Nixon Alfonzo Leal Toro, Carlos Pérez and Renzo David Prieto Ramírez); 7/2015 (Rosmit Mantilla); 1/2015 (Vincenzo Scarano Spisso); 51/2014 (Maikel Giovanni Rondón Romero and 316 others); 26/2014 (Leopoldo López); 29/2014 (Juan Carlos Nieto Quintero); 30/2014 (Daniel Omar Ceballos Morales); 47/2013 (Antonio José Rivero González); 56/2012 (César Daniel Camejo Blanco); 28/2012 (Raúl Leonardo Linares); 62/2011 (Sabino Romero Izarra); 65/2011 (Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera and Juan Carlos Carvallo Villegas); 27/2011 (Marcos Michel Siervo Sabarsky); 28/2011 (Miguel Eduardo Osio Zamora); 31/2010 (Santiago Giraldo Florez, Luis Carlos Cossio, Cruz Elba Giraldo Florez, Isabel Giraldo Celedón, Secundino Andrés Cadavid, Dimas Oreyanos Lizcano and Omar Alexander Rey Pérez); and 10/2009 (Eligio Cedeño).

violation of fundamental rules of international law, including the Universal Declaration of Human Rights and the Covenant.

49. Lastly, in light of the recurrent pattern of arbitrary detention identified by international human rights mechanisms in recent years, the Government is urged to consider inviting the Working Group to make a country visit. Such visits are an opportunity for the Working Group to engage in direct dialogue with the Government concerned and with representatives of civil society, with the aim of better understanding the situation of deprivation of liberty in the country and the underlying reasons for arbitrary detention.

50. Lastly, in the light of the allegations made by the source concerning violations of the right to health during the prolonged period of detention, as well as Mr. Crovato Sarabia's position as a lawyer and human rights defender, the Working Group has decided to forward the information to the Special Rapporteur on the right to health, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders for their consideration and possible action.

Disposition

51. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Marcelo Eduardo Crovato Sarabia, being in contravention of articles 8, 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and articles 2, 9, 14, 19, 21 and 22 of the International Covenant on Civil and Political Rights, to which the State is a party, is arbitrary and falls within categories I, II, III and V of the methods of work.

52. The Working Group requests the Government to take the steps necessary to remedy the situation of Mr. Crovato Sarabia without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

53. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Crovato Sarabia immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

54. In accordance with paragraph 33 of its methods of work, the Working Group transmits the present opinion to the Special Rapporteur on the right to health, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders for their consideration and possible action.

Follow-up procedure

55. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on follow-up action taken on the recommendations made in this opinion, including:

(a) Whether Mr. Crovato Sarabia has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Crovato Sarabia;

(c) Whether an investigation has been conducted into the violation of Mr. Crovato Sarabia's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Government with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

56. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

57. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

58. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[7]

[*Adopted on 23 November 2017*]

[7] See Human Rights Council resolution 24/7, paras. 3 and 7.

United Nations A/HRC/WGAD/2017/88

General Assembly

Distr.: General
23 January 2018

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 88/2017 concerning Thirumurugan Gandhi (India)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 8 September 2017, the Working Group transmitted to the Government of India a communication concerning Thirumurugan Gandhi. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Thirumurugan Gandhi, aged 42 at the time of his arrest, is a citizen of India resident in Chennai, Tamil Nadu. Mr. Gandhi is a supporter of the Tamil peoples' cause and founder of the "May 17 Movement", established in remembrance of Tamils who lost their lives on that day in 2009. Furthermore, Mr. Gandhi advocates for the self-determination of Tamils, Palestinians, Kurds, Kashmiris, Sahrawis and Sikhs. He regularly lobbies the diplomatic community on behalf of these groups, as well as on behalf of indigenous peoples and communities that allege to have been subjected to war crimes.

5. Moreover, Mr. Gandhi reportedly advocates for the right to life of migrant workers, the right of farmers to water and the rights of workers, refugees, persons with disabilities, persons belonging to linguistic and religious minorities and transgender persons. Mr. Gandhi has been active in protesting against the World Trade Organization's rules concerning public distribution systems, privatization of electricity, projects that could be potentially detrimental to the environment, such as hydraulic fracturing, and building nuclear reactors in densely populated areas. Mr. Gandhi is a supporter of protests against the use of nuclear power plants and has led such protests in Kudankulam since 2012.

6. The source states that the May 17 Movement has been holding annual silent peaceful gatherings since 2010. A candlelight vigil reportedly took place on 21 May 2017 in Kamaraj Salai, near the Marina Beach in Chennai, and comprised more than 500 participants. The source notes that, on earlier occasions, the police had denied permission for such gatherings, citing orders under section 41 of the Madras City Police Act. However, since this gathering was intended to be a silent, non-violent candlelight vigil, no police permission was formally received.

7. The source reports that the Tamil Nadu police arrested two groups of individuals participating in the vigil. These arrests were carried out according to sections 147, 148, 341 and 506 (2) of the Indian Penal Code; section 7 (1) (a) of the Criminal Law Amendment Act and section 3 of the Tamil Nadu Public Property (Prevention of Damage and Loss) Act. Mr. Gandhi was included in a group comprising 35 persons. The source indicates that no arrest warrant was shown at the time, contrary to the provisions of section 41 B (b) (i) and (ii) and (c) of the 1973 Code of Criminal Procedure.

8. The source notes that the entire arrest was captured live on television, with the press following the arrested individuals and interviewing them. The video evidence therefore clearly demonstrates the fact that those participating at the vigil had no weapons and carried only candles and banners.

9. The source further specifies that the arrested persons were transported from the Community Hall to the Government Royapettah Hospital and, by midnight on 21 May 2017, to the police station. At 1.30 a.m. on 22 May 2017, the arrested individuals were moved from the police station to the Metropolitan Magistrate's Court for their remand hearing. Some 17 persons were reportedly detained on the night of 21 to 22 May. Eighteen other individuals, notably 1 woman and 17 students, were released. The source maintains that the detained individuals were beaten and suffered injuries in police custody.

10. According to the source, all those detained, except four individuals, were subsequently released on bail. The source states that the duration of the preventive detention without bail for Mr. Gandhi was set at one year. He was held in custody in the Puzhal Central Prison in Chennai.

11. On 29 May 2017, Mr. Gandhi and three other individuals were charged by the City Police Commissioner under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Cyber Law Offenders, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Sexual Offenders, Slum Grabbers and Video Pirates Act, 1982 (Tamil Nadu Act No. 14 of 1982), commonly known as the Tamil Nadu Goondas Act.

12. According to the source, Mr. Gandhi later appeared before the Advisory Committee, which upheld his detention. Mr. Gandhi then challenged this decision in the Madras High Court. Case hearings had been postponed at the time the source made the submission.

13. The source points to a number of procedural irregularities. The source maintains that the facts recorded by the police in their arrest report do not correspond to the above-mentioned sequence of events. Furthermore, one of the witnesses, who supposedly signed the arrest report, denies ever having done so. In addition, the police allegedly confiscated some property from Mr. Gandhi on 21 May 2017. Court documents indicate that it was received by the Metropolitan Magistrate's Court only 10 days after the arrest, on 31 May 2017.

14. The source further argues that Mr. Gandhi should not have been remanded in custody in the light of the judgment of the Supreme Court of India in Criminal Appeal No. 1277 of 2014. In that judgment, the Supreme Court seeks to ensure that police officers do not arrest persons unnecessarily and that magistrates do not authorize detention casually and mechanically. As such, the Supreme Court stated that the police should comply with a specified checklist and present it to the magistrate. The source notes that, in the present case, the remand order does not confirm that the police report prescribed by the Supreme Court was used. The source therefore maintains that the police arrested Mr. Gandhi illegally and that the magistrate mechanically ordered remand measures.

15. Moreover, the source indicates that five pending cases have been cited as the grounds for the preventive detention order of the Chennai Police Commissioner, dated 29 May 2017. Those offences are merely first information reports registered by the police, which have not been investigated for 805, 624, 387, 189 and 255 days, respectively. The Code of Criminal Procedure states that, under section 167, investigations are to be concluded in a period ranging from 60 to 90 days. The source therefore argues that the detention order, which relies on five cases that were filed between 2015 and 2016, is irregular.

16. The source further maintains that any person who fights for the rights of the people is a human rights defender and cannot be portrayed as a member of a gang under the Tamil Nadu Goondas Act or as a person habitually committing offences. The source argues that, if this practice continues to go unchallenged, human rights defenders will be placed at a great risk of being detained arbitrarily under the above-mentioned Act.

17. The source further states that a complaint concerning the arrest and subsequent detention of Mr. Gandhi was presented to the National Human Rights Commission. The Commission, however, did not consider itself able to intervene and transmitted the complaint to the State Human Rights Commission of Tamil Nadu for appropriate action.

Response from the Government

18. On 8 September 2017, the Working Group transmitted the allegations from the source to the Government through its regular communication procedure. The Working Group requested the Government to provide detailed information by 9 November 2017 about the current situation of Mr. Gandhi and any comments that it might have on the source's allegations.

19. The Working Group regrets that it did not receive a response from the Government to this communication, and the Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Recent developments

20. It has come to the Working Group's attention that Mr. Gandhi and his associates were released on 20 September 2017, one day after the Madras High Court, on 19

September 2017, reportedly quashed the Chennai Police Commissioner's preventive detention order of 29 May 2017 under the Tamil Nadu Goondas Act.[1]

Discussion

21. At the outset, the Working Group welcomes the release of Mr. Gandhi on 20 September 2017 after the ruling by the Madras High Court on 19 September 2017. Following his release, the Working Group has the option of filing the case or rendering an opinion as to the arbitrariness of the detention, in conformity with paragraph 17 (a) of its methods of work. In this particular case, the Working Group has decided to render the present opinion, and given the absence of a response from the Government, in conformity with paragraph 15 of its methods of work. In making this decision, the Working Group gives particular weight to the fact that, although Mr. Gandhi and his associates have all been released, (a) the circumstances in which they were detained were serious and warrant further attention[2] as they were initially detained for taking part in an assembly and then held in preventive detention under the Tamil Nadu Goondas Act; (b) Mr. Gandhi was deprived of his liberty for four months; and (c) the Government has failed to inform the Working Group about the guarantees of non-repetition let alone the Government's version of events or Mr. Gandhi's release ordered by the Madras High Court.

22. The Working Group notes that Mr. Gandhi's arrest and detention largely concerned the laws and officials under the jurisdiction of the federal state of Tamil Nadu in India. The Working Group nevertheless reminds the central Government of India that the provisions of the Covenant extend to all parts of federal states without any limitations or exceptions under article 50 of the Covenant. In addition, the provisions of the Universal Declaration of Human Rights extend no less universally to all subsidiary political units of decentralized States.

23. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

24. The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[3] However, the Working Group reiterates that it has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the application of national law by the judiciary.[4]

25. The Working Group also reiterates that it applies a heightened standard of review in cases in which the freedom of expression and opinion is restricted or where human rights defenders are involved.[5] Mr. Gandhi's role as a social activist and human rights defender for the self-determination of various peoples, for migrant workers and refugees, for persons

[1] Mohamed Imranullah S., "HC quashes order detaining Thirumurugan Gandhi under Goondas Act", *The Hindu*, 19 September 2017. Available at www.thehindu.com/news/national/tamil-nadu/hc-quashes-order-detaining-thirumurugan-gandhi-under-goondas-act/article19714081.ece.

[2] See opinion No. 50/2017, para. 53 (c).

[3] See opinion No. 33/2015, para. 80.

[4] See opinions No. 63/2017, para. 45; No. 59/2016, para. 60; No. 12/2007, para. 18; No. 40/2005, para. 22; and No. 10/2002, para. 18.

[5] See opinions No. 57/2017, para. 46; No. 41/2017, para. 95; No. 62/2012, para. 39; No. 54/2012, para. 29; and No. 64/2011, para. 20. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, especially when there are claims of a pattern of harassment (see opinion No. 39/2012, para. 45). See also General Assembly resolution 53/144 (Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms), article 9 (3).

with disabilities, for linguistic and religious minorities and for transgender persons requires the Working Group to undertake this kind of strict scrutiny.[6]

Category I

26. The Working Group will examine the relevant categories applicable to its consideration of this case, including category I, when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.

27. While the Government has failed to offer any evidence to rebut the source's claim, the source has made a prima facie case that the police did not observe the relevant rules of the international norms on detention at the time of the arrest of Mr. Gandhi, including the right to be presented with an arrest warrant, except in flagrante delicto, which is inherent in the right to liberty and security of a person under article 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant.

28. The Working Group also notes that a number of procedural irregularities took place while making judicial records of the event, which adds doubt to the whole process of criminal administration concerning the present case.

29. The Working Group also considers that the five pending cases cited as the basis for the preventive detention order of 29 May 2017 under the Tamil Nadu Goondas Act are obsolete and not convincing enough to warrant the validity of the order. Furthermore, there has not been an individualized application of the law to the case. This belief is further strengthened by the fact that the Madras High Court, on 19 September 2017, quashed the same order.

30. The Working Group underlines that the right to liberty and security of the person prohibits arbitrary arrest and detention as guaranteed in articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant. As stated in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, deprivation of liberty is regarded as unlawful when it is not on such grounds and in accordance with procedures established by law.[7]

31. The Working Group therefore considers that the arrest and detention of Mr. Gandhi lack any legal basis in violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant. The Working Group thus concludes that his detention is arbitrary, falling under category I.

Category II

32. The Working Group recalls that holding and expressing opinions, including those that are not in accordance with official government policy, are protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. In the same manner, the Government must respect, protect and fulfil the right to assemble peacefully and to associate with others even if the peaceful assembly and association stand for causes not to its liking in accordance with article 20 of the Universal Declaration of Human Rights and articles 21 and 22 of the Covenant.

33. Mr. Gandhi, as a social activist and human rights defender, was exercising these fundamental freedoms under international human rights law when he advocated for the self-determination[8] of Tamils, Palestinians, Kurds, Kashmiris, Sahrawis and Sikhs. He later

[6] Human rights defenders, in particular, have the right to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through those and other appropriate means, to draw public attention to such matters, see the Declaration on Human Rights Defenders, article 6 (c). Human rights defenders have the right to investigate, gather information regarding human rights violations and report on them, see opinion No. 8/2009, para. 18.

[7] See A/HRC/30/37, para. 12.

[8] The Working Group notes that India made a declaration upon its double accession in 1979 to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights that the words "the right of self-determination" appearing in common article

founded the May 17 Movement and organized annual candlelight vigils, when he was initially arrested without due process on 21 May 2017 and held under a preventive detention order that was subsequently quashed by the Madras High Court on 19 September 2017.

34. According to the source, the Chennai Police Commissioner issued the preventive detention order under the Tamil Nadu Goondas Act based on unproven allegations that the police had failed to investigate for years.

35. The Working Group is convinced that Mr. Gandhi's preventive detention is clearly connected to the exercise of his rights and freedoms as a social activist and human rights defender. The only legitimate limitations to the exercise of such rights and freedoms must be for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. However, the Government has offered no such justification in this case. Nor did the Government deny that the candlelight vigil on 21 May 2017 was peaceful. The Working Group therefore considers that Mr. Gandhi's preventive detention was neither legitimate, necessary nor proportionate under its four-prong test.[9]

36. Furthermore, the Working Group notes that the Tamil Nadu police detained over 1,250 persons in 2015 under preventive detention laws, including the Tamil Nadu Goondas Act.[10] The Working Group expresses its concern at the chilling effect that the widespread use of preventive detention against human rights defenders is bound to have on their exercise of the right to freedom of expression, assembly and association.

37. For these reasons, the Working Group is of the opinion that Mr. Gandhi's deprivation of liberty was in violation of articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the Covenant, falling within category II.

Category III

38. The Working Group has also considered whether the violations of the due process and fair trial rights suffered by Mr. Gandhi were of such gravity as to give his deprivation of liberty an arbitrary character, falling within category III.

39. Article 9 (3) of the Covenant provides for the right to trial within a reasonable time or to release and stipulates the general rule that pretrial detention should be the exception. In accordance with articles 10 and 11 of the Universal Declaration of Human Rights and article 14 of the Covenant, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against him or her, at which he or she has had all the guarantees necessary for the preparation of his or her defence and during which the individual must be presumed innocent until proven guilty.

40. The Working Group notes that the Tamil Nadu Goondas Act gave the police inspector and other State officials the power to detain any person indefinitely without trial in the name of crime prevention. Although Mr. Gandhi and his associates won a reprieve after the Madras High Court's intervention, they had already been deprived of their liberty for four months due to the preventive detention order and had endured inhuman treatment,

---

1 "apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation — which is the essence of national integrity". Some States raised objections to the declaration of India, which they regarded as a reservation to the two Covenants. The Working Group is also of the view that the declaration of India is not only contrary to the clear language of the provision but also incompatible with the object and purpose of the Covenants in line with the view expressed by the Human Rights Committee. See the Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, para. 9.

9 See opinions No. 56/2017, para. 51; No. 41/2017, para. 86; and No. 54/2015, para. 89.

10 Amnesty International, "Urgent action: activists held under administrative detention", 2 June 2017. Available at www.amnesty.org/download/Documents/ASA2064092017ENGLISH.pdf.

such as beatings, during police custody in violation of article 5 of the Universal Declaration of Human Rights and articles 7 and 10 of the Covenant, as well as the Convention against Torture, to which India is a signatory. India is thus obliged to refrain from acts that would defeat the object and purpose of the Convention against Torture in accordance with article 18 of the Vienna Convention on the Law of Treaties. The Working Group is of the view that the prolonged preventive detention and ill-treatment of Mr. Gandhi impermissibly prejudiced his right to the presumption of innocence and negated his right to a fair trial.

41. In the light of the foregoing, the Working Group concludes that the non-observance of the international norms relating to the right to a fair trial established in the Universal Declaration of Human Rights and the Covenant is of such gravity as to give the deprivation of liberty of Mr. Gandhi an arbitrary character, falling under category III.

Category V

42. The Working Group will now examine whether Mr. Gandhi's deprivation of liberty constitutes illegal discrimination under international law and whether it therefore falls under category V.

43. The Working Group has already established that Mr. Gandhi's arrest and preventive detention resulted from his exercise of the right to freedom of expression, assembly and association. When it is established that deprivation of liberty resulted from the active exercise of civil and political rights, there is a strong presumption that the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on political or other views.

44. The Working Group notes that the police initially denied Mr. Gandhi's May 17 Movement permission to gather and arrested the peaceful participants of the candlelight vigil. The incidents demonstrate the Government's indiscriminate prejudice and bias against the whole group of demonstrators who took to the street on 17 May 2017 because of their political or other views and their desire to exercise their civil and political rights, regardless of their individual responsibility for causing violence or committing other illegal acts. Mr. Gandhi's role as the founder and leader of the May 17 Movement also deserves consideration.

45. The Working Group cannot help but notice that Mr. Gandhi's political views are clearly at the centre of the present case and that the authorities have displayed an attitude towards Mr. Gandhi that can only be characterized as discriminatory. The police denied bail and continued to place him under prolonged preventive detention. The Working Group also considers that Mr. Gandhi's detention constitutes a violation of his right to equality before the law as he has been discriminated against on the basis of his status as a human rights defender.[11] All this does not point to the equal protection of the law.

46. For these reasons, the Working Group considers that Mr. Gandhi's deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant on the grounds of discrimination based on political or other opinion, as well as on his status as a human rights defender, aimed at and resulting in ignoring the equality of human beings. His deprivation of liberty therefore falls under category V.

Preventive detention under the Tamil Nadu Goondas Act

47. The Working Group will elaborate further on the propriety of preventive detention under the Tamil Nadu Goondas Act in view of the principle of legality and its effect on the right to a fair trial. One of the fundamental guarantees of due process is the principle of legality, including the principle of *nullum crimen sine lege certa*, which is particularly relevant in the case of Mr. Gandhi. The principle of legality, in general, ensures that no defendant may be punished arbitrarily or retroactively by the State.[12] This means that a

[11] See opinion No. 45/2016, para. 28.

[12] See opinions No. 57/2017, para. 64; No. 56/2017, para. 70; No. 51/2017, para. 55; and No. 20/2017, para. 49.

person cannot be convicted of a crime that had never been publicly announced or made publicly accessible; nor can they be charged under a law that is excessively unclear or convicted under a penal law that is passed retroactively to criminalize a previous act or omission.[13]

48. The Tamil Nadu Goondas Act (Tamil Nadu Act No. 14 of 1982 as amended by Acts Nos. 52 of 1986, 1 of 1988, 32 of 2004, 16 of 2006, 16 of 2008, 19 of 2014 and 20 of 2014) grants the State authorities, including police commissioners, extensive power to order the detention of goondas and other criminals to "prevent [them] from acting in any manner prejudicial to the maintenance of public order" (section 3).

49. Section 2 (f) of the Tamil Nadu Goondas Act defines a "goonda" as

> a person, who either by himself or as a member of or leader of a gang, commits, or attempts to commit or abets the commission of offences, punishable under section 153 [wantonly giving provocation with intent to cause riot — whether rioting does or does not take place] or section 153A [on promoting enmity between different groups on the grounds of religion, race, place of birth, residence, language, etc., and engaging in acts prejudicial to the maintenance of harmony] under chapter VIII or under chapter XVI [on offences affecting the human body] or chapter XVII or Chapter XXII [on criminal intimidation, insult and annoyance] of the Indian Penal Code, 1860 (Central Act XLV of 1860) or punishable under section 3 [punishment for committing mischief in respect of property] or section 4 [mischief causing damage to property by fire or explosive substance] or section 5 [punishment for throwing stones, bricks, etc., at persons travelling in motor vehicles] of the Tamil Nadu Public Property (Prevention of Damage and Loss) Act, 1992 (Tamil Nadu Act 59 of 1992).

50. The Working Group notes that laws that are vaguely and broadly worded may have a chilling effect on the exercise of the right to freedom of expression, as they have the potential for abuse. They may also violate the principle of legality under article 11 (2) of the Universal Declaration of Human Rights and article 15 of the Covenant, as it makes it unlikely or impossible for the accused to have a fair trial. Furthermore, the Working Group notes that the Human Rights Committee found, in its case law, that detention pursuant to proceedings that were incompatible with article 15 were necessarily arbitrary within the meaning of article 9 (1) of the Covenant.[14]

51. The concerns expressed with regard to the vague definition of terrorist conduct (see, e.g., CCPR/CO/81/BEL, para. 24) and other criminal offences, such as organized crime (see, e.g., CCPR/C/79/Add.115, para. 12), are equally pertinent for the terms used in the Tamil Nadu Goondas Act. The Working Group underlines that Mr. Gandhi's ordeal clearly demonstrates the potential for abuse by authorities acting ultra vires.

Country visit to India

52. The Working Group would welcome the opportunity to conduct a country visit to India, in accordance with the request it made on 6 April 2017, so that it can engage with the Government constructively and offer assistance in addressing its serious concerns relating to the arbitrary deprivation of liberty. The Working Group notes that India has issued a standing invitation to all special procedure mandate holders since 14 September 2011 and looks forward to an invitation to visit the country.

Disposition

53. Although Mr. Gandhi has been released, the Working Group, in accordance with paragraph 17 (a) of its methods of work, reserves the right to render an opinion as to whether or not the deprivation of liberty was arbitrary, notwithstanding the release. In the light of the foregoing, the Working Group renders the following opinion:

---

[13] Ibid.

[14] *Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 7.4 (2).

The deprivation of liberty of Thirumurugan Gandhi, being in contravention of articles 2, 3, 5, 7, 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and of articles 2, 7, 9, 10, 14, 15, 19, 21, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

54. The Working Group requests the Government of India to take the steps necessary to remedy the situation of Mr. Gandhi without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

55. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Gandhi an enforceable right to compensation and other reparations, in accordance with international law.

56. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case to the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

57. The Working Group encourages the Government to withdraw its declaration on common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Follow-up procedure

58. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparations have been made to Mr. Gandhi;

(b) Whether an investigation has been conducted into the violation of Mr. Gandhi's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of India with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

59. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

60. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

61. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[15]

[*Adopted on 23 November 2017*]

[15] See Human Rights Council resolution 33/30, paras. 3 and 7.